STATE OF MICHIGAN

COURT OF APPEALS

GENESEE CARE, L.C., d/b/a THE SURGERY CENTER,

Plaintiff-Appellant,

v

OSKEY BROTHERS CONSTRUCTION COMPANY, INC.,

Defendant-Appellee.

UNPUBLISHED
August 10, 2004

No. 246312
Genesee Circuit Court
LC No. 01-071538-CK

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

In this negligence, breach of contract, and breach of warranty case, plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendant under MCR 2.116(C)(7),[1] concluding that res judicata barred its suit. We affirm.

In April 1997, plaintiff, through its general contractor, hired defendant to install limestone-capped parapets on the roof of its building. Defendant finished the job in December 1997, and received a "substantial compliance" certificate within a few months of completion. In November 1998, an agent for defendant inspected the limestone caps in response to plaintiff's complaint that the limestone blocks had shifted after defendant set them. Plaintiff's building manager attended the inspection, complained of leaks and other issues stemming from the shifting blocks, and blamed the blocks' migration on defendant's faulty installation. Defendant denied fault, but also refused to inspect or remedy the problem because it had not received payment for its services. Defendant, as well as other subcontractors, filed a suit in April 1999 to collect the money that was owed them, or to enforce their liens on the improved property. Plaintiff never raised the issue of defendant's workmanship in the initial suit, and in fact stipulated to the validity of defendant's lien. The court handed down a judgment in defendant's favor in December 1999, and plaintiff eventually satisfied the judgment.

[1] Because the trial court based its ruling on MCR 2.116(C)(7), plaintiff's arguments regarding a question of fact under MCR 2.116(C)(10) are irrelevant.

In October 2000, defendant revisited the site to discuss continuing problems with the shifting blocks. When defendant failed to remedy the issue, however, plaintiff hired another contractor to lift the blocks off the roof's parapets and investigate. According to plaintiff's inspection, the blocks shifted primarily because defendant failed to anchor the blocks, but also because of defendant's poor caulk, joint, and sealant work. Plaintiff brought the instant suit in October 2001, alleging, among other things, that defendant breached its warranties by failing to repair the shifted blocks.

Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (2000). Application of the doctrine of res judicata requires the satisfaction of three elements: (1) a prior decision on the merits; (2) the matter contested in the second case was or could have been resolved in the first case; and (3) the action was between the same parties. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

Defendant demonstrates the first requirement because the court based its initial judgment on the merits of the case. The court entered the judgment after hearing summary disposition motions and reviewing the briefed issues. *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 536; 369 NW2d 922 (1985). Under these circumstances, the case did not need to proceed to trial before the court could enter a judgment on the merits. *Id*. Plaintiff's contrary argument fails.

Regarding the second requirement, "Michigan courts have broadly applied the doctrine of res judicata. They have barred not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Dart, supra*. In order to succeed in the original action, defendant needed to show that it performed the masonry work as described in the contract, including the fact that it performed the work in a good and workmanlike manner. See *Sickels v Berliner*, 368 Mich 474; 118 NW2d 248 (1962). Plaintiff, based on the same workmanship at issue here, could have defended its failure to pay by showing that defendant did not perform the work as described in the contract and was damaged by the failure. *Id*. The failure to raise a defense waives that defense, and the party who could have asserted the defense may not assert it as a claim in a subsequent action. *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995). Because the present claim arose from the same transaction on which the first action was based, the second prerequisite for res judicata has been met.

However, plaintiff represents that it did not know, and could not have known, that defendant's work was defective, so it would have been subject to sanctions under MCR 2.114 if it initially brought its claims against defendant as a defense. We disagree. The uncontested facts demonstrate that plaintiff knew that the limestone blocks were shifting as early as November 1998, and blamed defendant for their displacement and the resultant water leaks. Therefore, plaintiff could have asserted the claim in the earlier action without any fear of sanctions. Because the trial court properly determined that defendant knew or, exercising due diligence, should have known of the allegedly defective workmanship before the original suit even began, plaintiff's sanctions argument is a red herring and offers it no assistance. Merely reclassifying faulty workmanship as breach of warranty or as negligence does not alter the application of res judicata either, because plaintiff had access to all these theories in the first suit regardless of their nomenclature.

Finally, res judicata requires that the parties in the second suit were adverse parties in the first suit. There is no question that plaintiff and defendant here were both involved in the earlier lawsuit as adversaries. While plaintiff argues that the parties to the instant suit represent only two of the twelve parties involved in the original suit, it presents no authority for the proposition that the parties in each action must be identical. The fact that other parties were involved in the first action has no practical or legal significance. Because all three elements necessary for the application of res judicata were present, the trial court's grant of summary disposition was appropriate.

Plaintiff contends that it would have overburdened the first suit if it had raised workmanship issues against one subcontractor when at issue was its failure to pay several subcontractors. We disagree. Res judicata is a doctrine aimed at achieving judicial economy and peace of mind, and plaintiff does not demonstrate how either goal is promoted by potentially allowing it to institute separate renewed actions against several subcontractors years after they have moved on to other jobs.

Plaintiff also asserts that defendant waived the application of res judicata when it did not object to plaintiff's failure to join the instant claims to the original lawsuit. Plaintiff relies on a version of MCR 2.203(A) in effect when defendant initiated the original suit.[2] However, the relevant portion of that rule was eliminated during the pendency of the original suit, see MCR 2.203, so the new version of the rule applies to both cases. *Reitmeyer v Schultz Equipment & Parts Co, Inc*, 237 Mich App 332, 337; 602 NW2d 596 (1999). Moreover, we would uphold the application of res judicata to this case under either version, because the old rule did not apply when, as here, the new action amounted to relitigation of a decided issue under a different theory.

Finally, plaintiff alleges that the trial court erred when it did not allow plaintiff to amend its complaint by adding fraud. However, because plaintiff fails to demonstrate any extrinsic fraud, and never moved to amend the complaint in any event, these arguments fail. *Sprague*, *supra* at 313-314. Furthermore, plaintiff may not use the present suit as a means to collaterally

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[2] That version of MCR 2.203(A) stated:

> (1) In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.
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> (2) Failure to object in a pleading, by motion, or at a pretrial conference to improper joinder of claims or failure to join claims required to be joined constitutes a waiver of the joinder rules, and the judgment shall only merge the claims actually litigated. This rule does not affect collateral estoppel or the prohibition against relitigation of a claim under a different theory.

attack the original judgment. *Triplett v St Armour*, 444 Mich 170, 176; 507 NW2d 194 (1993); *Nederlander v Nederlander*, 205 Mich App 123, 126; 517 NW2d 768 (1994).

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell